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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NATALIO OROZCO VENEGAS, Defendant and Appellant.	F057393 (Super. Ct. No. BF122616A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Natalio Orozco Venegas guilty as charged of three acts of sexual molestation of his five-year-old granddaughter. Specifically, he was convicted on count 1 of oral copulation of a child (Pen. Code, § 288.7, subd. (b))[1] and on counts 2 and 3 of lewd or lascivious acts with a child (§ 288, subd. (a)). He appeals on two grounds. First, appellant claims that statements he made to police officers during an interrogation were admitted into evidence in violation of his constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Second, appellant claims the evidence was insufficient to support his conviction on counts 2 and 3. For reasons that follow, we uphold the trial court's determination that appellant waived his *Miranda* rights and we reject appellant's challenge to the sufficiency of the evidence. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the afternoon of March 11, 2008, C. and her three daughters were living with C.'s mother and father (appellant) in a three bedroom house in Bakersfield, California. C.'s two brothers and one sister also lived there. On the day in question, C.'s sister, N., was present in the house with her children. While C. was nursing her baby in the living room, N. expressed concern that she could not find C..'s five-year-old daughter, D. C. and N. then began looking for D. throughout the house, calling D.'s name, but they could not find her. N. banged loudly on the locked door of the master bedroom, where appellant was, but no one responded.

Moments later, D. walked out of the master bedroom, noticeably upset. C. asked her daughter what was wrong and D. said that something had happened in the bedroom. D. explained, "[G]randpa did this, and she pointed from her mouth to her vagina." C. then ran into the master bedroom, pounded on the door of the master bathroom and yelled at appellant, asking what he had done to her daughter. Appellant made no

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

response. C. then called the police. Appellant left the house before the police arrived, but on his way out he tried to assure C. that nothing had happened and said she could take D. to the hospital to have her examined.

Officer Marcy White of the Bakersfield Police Department was one of two officers who responded to the house that afternoon. Officer White spoke with D. in the front yard, where D. told her that appellant "had put his tongue on her, and she pointed to her vagina." D. told Officer White that this happened while she was on the floor in her grandma's bedroom. D. also told Officer White that appellant had done the same thing to her before "a lot" of times.

Police Detective Jamie Montellano also responded to the house but interviewed D. about an hour later at the police station. D. told the detective that appellant had touched her on her private parts. She said that appellant had pulled her pants and underwear down and licked her, pointing to her vagina. She said that appellant licked her "hard" this time, and added that it happened "a lot."

When D. testified at trial, she said that appellant did not touch her after all, and she had lied when she told the police officers that he did those things. She did not know why she had lied. D. remembered telling her mother that appellant licked her and pointing to the part of her body where she said that he licked her, "[b]ut he didn't." She admitted that she told the police officers the same thing she told her mother and that she also told them appellant had done it before, "[b]ut he didn't." When asked if she told the police officers he had done it "lots" of times, D. said yes "[b]ut he only did it once." D. testified that she loved appellant and wanted him to come home.

On March 11, 2008, appellant was transported to police headquarters by Officer Kevin Findley. Since appellant initially indicated he wanted to speak in Spanish, Officer Ascencion Barrera assisted in questioning appellant. The interview began in Spanish, including the reading of appellant's *Miranda* rights, but soon thereafter appellant indicated he was comfortable speaking English, so the remainder of the interview was

conducted in English. The interview with appellant was video recorded and played for the jury.[2]

After reading appellant his *Miranda* rights, Officers Barrera and Findley asked appellant about what happened when D. was in the master bedroom. Appellant admitted that he locked the door to the master bedroom, but at first claimed that he did not know D. was there. After denying numerous times that he touched D., appellant gradually divulged the details of what happened. He first said that he touched D. "in back of her pants" and above her belt buckle, but not "down below." Later, appellant admitted that he pulled D.'s pants down and touched the outside of her vagina with his hand. Eventually, appellant admitted that he put his mouth on D.'s vagina and touched her butt with his hand. Appellant admitted he had done this before to D., about a month earlier. He said it had happened "[t]wo, three times," then said it was "[t]hree or four times." Appellant confided that it started about a month earlier because D. would sleep in the bed with appellant and his wife, and appellant got "feelings." He started to sleep in the garage to avoid the "feeling[s]."

Appellant testified at trial that he was pressured and confused during the police interview, so he just told the police officers what they wanted to hear. He denied that he ever touched D. in an improper way. He then explained his version of what happened on the day of his arrest. He had been asleep and alone in the master bedroom until he was awakened by the sound of knocking on the bedroom door. At some point, he decided to lock the door. He went back to sleep but was awakened by the sound of D. playing with shampoo bottles in the bathroom. He turned on the television for her so she could watch cartoons, and then he went into the bathroom until he heard N. banging loudly on the door. He helped D. buckle her belt, opened the bedroom door for N., went back into the

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2 Written transcripts of the interview were also provided to the jury.

bathroom to check his cell phone messages, and then left the house for awhile. When he returned to the house, he was told he had to go to the police station.

The jury found appellant guilty of oral copulation with a child in violation of section 288.7, subdivision (b) (count 1), and of two counts of lewd or lascivious acts with a child in violation of section 288, subdivision (a) (counts 2 and 3). On March 20, 2009, after denying appellant's motion for a new trial, the trial court sentenced appellant to prison on count 1 for 15 years to life and on count 3 for six years. The sentence on count 2 was stayed pursuant to section 654. Appellant then filed his notice of appeal.

DISCUSSION

I. Appellant's Interview with Police Was Properly Admitted

In a motion in limine, appellant sought to exclude the statements he made to Officers Findley and Barrera during the interrogation on March 11, 2008. Appellant argued that his rights under *Miranda* were violated because he never expressly or impliedly waived his right to remain silent, and thus the statements were inadmissible. Following a hearing under Evidence Code section 402, the trial court denied appellant's motion. Appellant contends on appeal that the trial court prejudicially erred.

In reviewing appellant's contention that his *Miranda* rights were violated, we accept the trial court's resolution of disputed facts and inferences, as well as its evaluation of the credibility of witnesses where supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) "'Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]'" (*Ibid*.)

The principles regarding a defendant's waiver of *Miranda* rights were recently summarized by the California Supreme Court in *People v. Cruz* (2008) 44 Cal.4th 636, as follows: "*Miranda* makes clear that in order for defendant's statements to be admissible

against him, he must have knowingly and intelligently waived his rights to remain silent, and to the presence and assistance of counsel. [Citation.] [¶] It is further settled, however, that a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] We have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.]" (*Id*. at p. 667.) "[U]ltimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]" (*Id*. at p. 668.)

Of critical importance to the present case, "[a] suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]" (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 667-668; accord, *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Johnson* (1969) 70 Cal.2d 541, 558.) This principle was upheld in a recent opinion by the United States Supreme Court, which found an implied waiver of *Miranda* rights in the case before it, explaining as follows: "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Berghuis v. Thompkins* (2010) ___ U.S. ___ , ___ [130 S.Ct. 2250, ___, 176 L.Ed.2d 1098, 1113].)

Here, the record reflects that at the outset of the police interview, Officer Barrera read to appellant his *Miranda* rights in Spanish, one right at a time, and asked him if he

understood such rights, and each time appellant answered in the affirmative that he understood.[3] Specifically, the following exchange[4] took place:

"[Officer] Barrera: [Look I'm going to explain some rights that you have.]

"[Appellant]: Uh huh.

"[Officer] Barrera: [If you don't understand them…]

"[Appellant]: Uh huh.

"[Officer] Barrera: […and I'll explain it to you.] Okay?

"[Appellant]: Uh huh.

"[Officer] Barrera: [The first one. You have the right to remain silent.]

"[Appellant]: Uh huh.

"[Officer] Barrera: [Do you understand?]

"[Appellant]: [Yes.]

"[Officer] Barrera: [Anything that you say can be used against you in a court of law. Do you understand?]

"[Appellant]: [Yes.]

"[Officer] Barrera: [You have the right to have an attorney present before and during, uh, before and during … any questioning. Do you understand that?]

"[Appellant]: Uh huh.

"[Officer] Barrera: [If you cannot afford an attorney …]

"[Appellant]: Uh huh.

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3 As the trial court noted, when appellant said "[u]h huh" in response to the questions whether he understood his rights, it was clearly an affirmative response because he was also, with each such response, nodding his head up and down in an affirmative manner.

4 The bracketed portions were spoken in Spanish.

"[Officer] Barrera: […one will be appointed to you free of charge…]

"[Appellant]: [Free.]

"[Officer] Barrera: […before questioning if you want. Do you understand?]

"[Appellant]: [Yes I understand.]

"[Officer] Barrera: [What is your name sir?]

"[Appellant]: [Natalio Venegas.]"

At the Evidence Code section 402 hearing, the trial court watched the video recording of the interview, and heard testimony from appellant and the two officers present during the interview.[5] On the basis of that evidence, the trial court found that appellant was adequately advised of his *Miranda* rights *and*, as demonstrated by appellant's affirmative responses (including the nodding of his head), understood each of his *Miranda* rights. Furthermore, the trial court found that appellant's conduct of answering the officers' questions immediately after acknowledging he understood his rights "constitute[d] a valid implied waiver of his *Miranda* Rights." (Italics added.) As is readily apparent from the record summarized above, these findings were supported by substantial evidence. And, as the United States Supreme Court and the California Supreme Court have plainly held, such circumstances are sufficient to support an implied waiver of *Miranda* rights. (*Berghuis v. Thompkins*, *supra*, ___ U.S. ___ , ___ [130 S.Ct. 2250, ___, 176 L.Ed.2d at p. 1113]; *People v. Cruz*, *supra*, 44 Cal.4th at pp. 667; *People v. Medina*, *supra*, 11 Cal.4th at p. 752; *People v. Sully*, *supra*, 53 Cal.3d at p. 1233; *People v. Johnson*, *supra*, 70 Cal.2d at p. 558.) We conclude that the trial court correctly

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[5] At no time during the interrogation did appellant say that he wanted to remain silent, that he did not want to talk to the police officers, or that he wanted an attorney. Rather, after acknowledging that he understood his *Miranda* rights, he proceeded to answer the police officers' questions.

concluded that appellant waived his *Miranda* rights and therefore the statements appellant made to the police were properly admitted.

II. Evidence Sufficient to Support Convictions on Counts 2 and 3

Appellant contends there was insufficient evidence to convict him of lewd or lascivious acts against D. as charged in counts 2 and 3. The crime of committing a lewd or lascivious act upon a child requires a touching of a child under the age of 14 with the specific intent "of arousing, appealing to, or gratifying the lust, passions, or sexual desires." (§ 288, subd. (a); *People v. Davis* (2009) 46 Cal.4th 539, 606.) Here, the criminal information alleged that appellant committed the act in count 2 on or about March 11, 2008 (the same day as the count 1 charge), and in count 3 "On or about and between January 1, 2008 and March 11, 2008." (Unnecessary capitalization omitted.) Because we find that both counts were adequately supported by substantial evidence, we reject appellant's challenge.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Reversal … is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*Ibid.*)

The evidence in support of count 2 included appellant's admission that, in addition to orally copulating D. on March 11, 2008, he pulled her pants down and touched her tummy, buttocks and vagina. Appellant's admission that he touched D. in such manner on March 11, 2008, was corroborated by Detective Montellano's testimony that D. reported that appellant pulled down her pants and underwear and touched her on her private parts, and that he licked her more than one time.

The evidence in support of count 3 included appellant's admission that he had orally copulated D. three or four times before, starting about one month before the March 11, 2008, offenses when he started having feelings toward her. Appellant's admission that he committed previous acts of oral copulation on D. during that period of time was corroborated by the testimony of Detective Montellano and Officer White, both of whom testified that D. reported that appellant had done the same thing to her "a lot" or "lots" of times. We conclude there was substantial evidence to support appellant's conviction on counts 2 and 3.

As to counts 2 and 3, appellant next argues the corpus delecti of these alleged crimes was not established independent of appellant's extrajudicial statements, admissions or confessions. We disagree. "[T]he quantum of evidence required is not great, and 'need only be "a slight or prima facie showing" permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 722.) "'The inference [that a crime has been committed] need not be "the only, or even the most compelling, one … [but need only be] a *reasonable* one."'" (*Ibid*., quoting *People v. Jones* (1998) 17 Cal.4th 279, 301-302.) We agree with the People that the police officers' testimony of what D. reported to them regarding appellant's conduct was a sufficient quantum of evidence to provide the independent corroboration needed to support the convictions.

Finally, we reject appellant's further argument regarding count 3 that "generalized evidence that a person committed a crime at some undefined moment in history is not sufficient evidence on which to sustain a conviction" for an act allegedly occurring between January 1, 2008, and March 11, 2008. That is not an accurate characterization of the entire evidence relevant to count 3. When D. described the oral copulation that appellant committed on March 11, 2008, she told the police officers that appellant had done the same thing "lots" of times before. Additionally, appellant admitted that he had

previously touched D. in the same manner as he did on March 11, 2008, "[t]hree or four" times, all during the one-month period before March 11, 2008. Thus, the evidence was sufficient to support appellant's conviction on count 3 of a lewd or lascivious act committed against D. between January 1, 2008, and March 10, 2008.

Viewing the evidence in the light most favorable to the judgment, we conclude that there was substantial evidence presented at trial that was sufficient to support appellant's convictions on counts 2 and 3.

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Gomes, J.